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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1952

NO. 682

JOEL S. COOPER,
Petitioner,

vs.

C. A. PEAK, et al.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA WITH SUPPORTING ARGUMENT

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

To the Honorable the Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Alabama, entered in the above entitled case on August 27, 1952, rehearing last denied November 2, 1952.

OPINIONS BELOW

The opinions of the Circuit Court for Elmore County, Alabama, Judge Oakley Melton presiding, are not reported. The principal opinion of the Supreme Court of Alabama and the denial of the application for rehearing are reported at _____ Ala. _____, 61 So. (2d) 62.

JURISDICTION

The case involves the determination of the rights of a soldier in certain land, when mortgages existing on the land at the time the soldier entered military service, were foreclosed while the soldier was in such service, without regard to the provisions of the Soldiers' and Sailors' Relief Act of the United States.

MANNER IN WHICH FEDERAL QUESTIONS WERE RAISED

The fact that your petitioner was claiming rights under the Soldiers' and Sailors' Civil Relief Act of the United States was brought to the attention of the trial court in paragraph 5 of the original bill of complaint (R. 3), in paragraph 6 of the amendment to the original bill of Complaint (R. 38) and in the prayer of said amendment (R. 39). The trial court denied relief (R. 263).

The fact that Complainant was denied federal rights was raised in the Supreme Court of Alabama in the assignment of errors on appeal to that court (R. 266 and 267). The Supreme Court of Alabama denied all rights (R. 269-277).

The Supreme Court of Alabama in its opinion stated:

> "The basis of complainant's contention that he was entitled to exercise the equity of redemption was that at the time of the foreclosure sale he was in the military service of the United States, as defined by the Soldiers and Sailors Civil Relief Act of October 17, 1940 and, therefore, that the foreclosure sale was not valid since there was no order of foreclosure granted by any competent court."

The opinion discusses various points in connection with the Soldiers and Sailors Relief Act and then states:

"But we do not find it necessary to construe the Act of Congress for the purpose of this case. For argument we will assume that it does apply and appellant's equity of redemption was not cut off."

QUESTION PRESENTED

The question presented is whether or not this foreclosure violated the provisions of the Soldiers and Sailors Civil Relief Act and, if so, the relief to which the petitioner is entitled.

STATUTE INVOLVED

Section 532 of Title 50 U.S.C.A. (set forth in part in Appendix hereto).

SPECIFICATIONS OF ERROR

The Supreme Court of Alabama erred:

1. In not holding the purported foreclosure to be null and void and in not setting aside said foreclosure.

2. In affirming the action of the lower court in dismissing petitioner's bill.

3. In not reversing the lower court.

4. In not granting to the petitioner, or in not requiring the lower court to grant to petitioner, such relief as petitioner was entitled to receive under the Soldiers and Sailors Relief Act.

REASONS FOR GRANTING RELIEF

1. The decision of the Supreme Court of Alabama is contrary to the Soldiers and Sailors Relief Act.

2. No sale under a power of sale contained in a mortgage is valid if made during the period of military

service of the owner thereof unless upon order of sale previously granted by the court and a return thereto made and approved by the court.

Title 50, Sec. 532 (1) and (3) App. USCA;

John Hancock Mutual Life Insurance Co. v. Lester, 125 NE 594, 234 Mass. 559;

Morse v. Stober, 123 NE 780, 233 Mass. 223, 9 ALR 78;

Hoffman v. Charleston Five Cents Savings Bank, 121 NE 15, 231 Mass, 324;

Godwin v. Gerling, 239 SW 352.

3. Foreclosure of a mortgage under power of sale contained therein while one of the owners thereof was in the military service of the United States, in violation of the Soldiers' and Sailors' Civil Relief Act of 1940, amounts to taking such owner's property without due process of law, which is prohibited by the Fifth Amendment of the Federal Constitution.

U. S. Constitution, Fifth Amendment.

4. A mortgagee or assignee of a mortgage, in possession of the mortgaged premises must account for the rents and profits derived from the property during such possession prior to a valid foreclosure of the mortgage.

Williams v. Noland, 205 Ala. 63, 87 So. 818;

Smith v. Stringer, 220 Ala. 353, 125 So. 226.

(The opinion of the Alabama Supreme Court had the effect of holding that the foreclosure was a bar to an accounting for rents admittedly collected on the mortgages prior to foreclosure).

5. The assignee of a mortgage who takes a mortgage after the law date thereof takes it subject to all

the defenses and equities between the mortgagor and mortgagee.

Stevens v. Whaley, 236 Ala. 276, 181 So. 778.

(The opinion of the Alabama Supreme Court in effect deprived the soldier of the right to interpose such defenses).

Petitioner can secure no relief, except through this Court.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Prior to its amendment on October 6, 1942, Section 532, subsections 1 and 3, Title 50 USCA, provided as follows:

Subsection 1: "The provisions of this section shall apply only to obligations originating prior to the date of approval of this Act and and secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still so owned by him."

Subsection 3: "No sale under a power of sale or under a judgment entered upon warrant of attorney to confess judgment contained in in any such obligation shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereto made and approved by the court."

STATEMENT OF FACTS AND ARGUMENT

I

STATEMENT OF FACTS

Joel S. Cooper, the petitioner herein, filed a bill of complaint in the Circuit Court of Elmore County, Alabama, In Equity, alleging that one of the respondents, one C. A. Peak, had foreclosed two mortgages during the time the petitioner was in the military service, without securing

the approval of a competent court as required by the Soldiers' and Sailors' Civil Relief Act.

Joel S. Cooper was one of nine children. Their father was J. S. Cooper. He died intestate on May 25, 1940, leaving the property in question (R. 269 and R 37). The property was encumbered at the time of his death by two mortgages, executed by the father. One of these was made in 1928 (R. 144). This was purchased by J. M. Holley on February 1, 1935 (R. 153-154). The other mortgage (probably merely a renewal of the 1928 mortgage) was to J M Holley, dated March 9, 1939 and due November 1, 1939 (R. 156). By agreement made between J. S. Cooper and Holley, rents were to be collected by one W. E. Strickland and paid by Strickland to Holley (R. 109 and 115-116). From 1935 on Cooper received no rents at all, all of the rents being paid by Strickland either to Holley or to Holley's estate (R. 116), to be applied on the mortgages.

Mr. Holley died and subsequently thereto, on December 4, 1941, both mortgages were sold to C. A. Peak, the respondent in this case (R. 149 and R. 160). Peak considered the mortgages in default and foreclosed both by power of sale contained in the mortgages, the foreclosure being completed on January 26, 1942 (R. 144-147). Peak bought in the property at the time of foreclosure. This was during the time Cooper was in military service. No effort was made by Peak to comply with the provisions of the Soldiers' and Sailors' Civil Relief Act.

Cooper entered military service on January 15, 1942 and was separated on December 19, 1945. He talked with C. A. Peak in January, 1946. At that time, according to Peak's testimony Peak offered to sell to Joel S. Cooper part of the property.

In the spring of 1946 C. A. Peak placed improvements on the property (R. 49-50). Testimony in behalf of said

Peak is to the effect that Cooper knew of these improvements and failed to advise Peak he considered the attempted foreclosure a nullity. Testimony of Cooper is to the effect that he notified Peak or attempted to notify him just as soon as he learned of the improvements (R. 128). Peak admits that he received notice as early as June, 1946 (R. 207). The bill of complaint in this case was filed in behalf of Cooper on October 16, 1946.

Cooper in his bill of complaint prayed that the attempted foreclosure be considered a nullity as being in violation of the Soldiers' and Sailors' Civil Relief Act, and that the property be returned to him and to his brothers and sisters as if a foreclosure had not occurred, and that an accounting be made by the mortgagee for the rents received by him. He prayed for such other, further and different relief as the court deemed necessary. His brothers and sisters were made parties respondent. Each filed an answer admitting the allegations of the bill and joining in the prayer for relief (R.6 and 7). The trial court after hearing, dismissed the bill, and the Supreme Court of Alabama affirmed the action of the lower court.

ARGUMENT

The petitioner submits that the attempted foreclosure sale was invalid under the Soldiers' and Sailors' Civil Relief Act of 1940. The statute gave to C. A. Peak a full and complete remedy to protect his interest, but he did not see fit to pursue that remedy. The statute is clear and unequivocal in providing that a mortgage foreclosure sale, under a power of sale, is invalid if made during the period of military service without a previous order of the court. Petitioner was in military service and no court order or approval was secured. The statute makes such a sale "invalid," which can only mean **void**, and it is difficult to see how any rights of ownership could accrue to a purchaser at such sale.

No case on all fours with the instant case has been found by petitioner,—possibly because, in the face of this statute, no one dared foreclose a mortgage on property owned by one in the military service without previous order of a court. Few cases have been found construing the Soldiers' and Sailors' Civil Relief Act of 1940. However, Section 302 of the Soldiers' and Sailors' Relief Act of 1918 was substantially the same as the 1940 statute; therefore cases construing the earlier statute are helpful. The following statements seem to well summarize the status of a mortgage foreclosure sale in violation of the statute:

> "It is well settled that during the time the Soldiers' and Sailors' Civil Relief Act is in force a mortgagee forecloses under power in a mortgage at his own peril, 'unless on an order previously granted by the court, and return made and approved' by it and while a sale is not necessarily bad, it was of no validity, if made during the military service of an owner of land, or within three months thereafter, if consummated, without such order and return." John Hancock Mut. Life Ins. Co. v. Lester, 1920, 125 NE 594, 234 Mass. 559.

> "The safe course for the mortgagee of property in which a person in the military service of the United States owned any interest, legal or equitable, was to foreclose under the order of a court of equity, for it was only by pursuing such course that he secured a record title not open to attack under the act." Morse v. Stober, 1919, 123 NE 780, 233 Mass. 223, 9 ALR 78.

In Hoffman v. Charlestown Five Cents Savings Bank, 231 Mass. 324, 121 NE 15, the defendant contended that the Act should not apply since he had no notice that complainant, who was in military service, was an owner of the mortgaged property. The Court replied in these words:

> "Yet, without question, these is no such limitation as that fact . . . The defendant has urged against this

construction of the section that if that be the true construction of it, the result is that until the termination of the time specified in the act, no mortgage can be foreclosed by any mortgagee except under an order of court, and it cannot be that that was the intention of Congress. We are of opinion that this is the result of of the true construction of the act, for in that way alone can a mortgagee be certain that the foreclosure of his mortgage will not be made in violation of the act."

Petitioner submits that the foreclosure of this mortgage contravenes the Fifth Amendment to the Constitution. Due process of law, as guaranteed under the Fifth and Fourteenth Amendments of the Federal Constitution, is prescribed for the instant case by the Soldier's and Sailors' Civil Relief Act, which act provided a procedure, and the only procedure, by which C. A. Peak could have foreclosed his mortgages; this procedure was not followed, and, the foreclosure of the mortgages under the power of sale contained therein constituted the taking of petitioner's property without due process of law.

It is immaterial that the mortgage debt was not the personal obligation of the petitioner. We admit that there are occasional statements in some of the cases to the effect that personal liability is material under certain sections of the Soldiers' and Sailors' Civil Relief Act but nowhere have we found any case, construing the section here involved, which decided that personal liability on the mortgage debt was a prerequisite to relief under the section. It is not a correct statement of law to say that "the Act" applies only to cases in which the one in military service is personally liable on the debt. Certain sections of the act do so provide, including Section 590.

It will be observed that Title 50, App. Sec. 532, USCA, both before and after its amendment of 1942, by its expressed terms, applies to obligations secured by mortgage

upon real or personal property, and does not specify **whose** obligation. Nowhere in the Act is there any provision, nor can any reasonable inference be drawn therefrom, that relief under this section is granted only against personal obligations. On the other hand Congress could have specified a personal obligation had it so intended but instead specified "obligations secured by mortgage on real property owned by one in military service." The obvious purpose of this section of the Act was to protect property rights which were jeopardy.

Further indication that relief is not limited to one personally liable is afforded by Title 50, App. Sec. 536 USCA, which affords relief to **dependents** of those in military service, even though they are in no sense liable on the obligation.

OPINION OF THE SUPREME COURT OF ALABAMA

We submit that the Supreme Court of Alabama in its opinion (R. 269-277) realized that the petitioner had certain rights but left those rights undetermined and unenforceable. That court in its opinion makes the following statement:

> "But we do not find it necessary to construe the Act of Congress for the purposes of this case. For argument we will assume that it does apply and that appellant's equity of redemption was not cut off" (R. 273).

Immediately following this statement the Alabama Supreme Court says as follows:

> "The foreclosure sale was not invalid in so far as the estate of the deceased mortgagor is concerned, or in so far as all of the other heirs of the estate, than the complainant, are concerned."

We submit that despite the court's assertion in the first quotation, the latter statement is a definite construction of the act. We urged upon the Alabama Supreme Court that the entire sale was invalid. The law itself provides that:

> "**No sale** under power of sale . . . **shall be valid** if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereto made and approved by the court" (underscoring supplied).

The act does not say that that part of a sale which is applicable to the man in military service shall be invalid. The sale, as we see it, is indivisible. We submit that the Supreme Court of Alabama, while stating that it will not construe the Act, has in reality construed it and has construed it erroneously.

If the Supreme Court of Alabama is correct in stating that the foreclosure sale was not invalid as to the other parties, then the decision should have been, we submit, that the foreclosure was invalid and void in so far as it related to the share of the person in military service. This the Court does not do. The Court states instead:

> "The only right which complainant might assert under the circumstances, assuming that by reason of the Act of Congress he still has an equity of redemption, would be to redeem his proportionate interest in the property unless the mortgagee requires him to redeem all interests." (R. 275).

Petitioner has no way in which he can assert an equity of redemption because that right has apparently been extinguished by the attempted foreclosure. If the Supreme Court of Alabama is of opinion that the man in military service has an equity of redemption as to his proportionate

share, we submit it should definitely state that the purported foreclosure is invalid in so far as that man's rights are concerned and that the purported foreclosure in so far as his rights are concerned is cancelled. This the Court does not do. Instead it dismisses his bill and thus bars him from all rights.

The Supreme Court of Alabama further states:

> "His (the petitioner's) redemption of all interests would, if permitted, operate so as to allow Peak as the owner of eight-ninths to share in its benefits. A court of equity would not approve such philosophy" (R. 275).

As we construe this sentence and other parts of the opinion, the petitioner would have had the right prior to the foreclosure to pay off all of the indebtedness, but the court allows that right to be extinguished by the foreclosure. We submit that it was the intent of the Soldiers' and Sailors' Civil Relief Act to preserve all of the rights of the man in military service intact. However, the Supreme Court of Alabama construes the Act in such a way that it allows the soldier's rights to be materially diminished.

There was an agreement that rents should be credited on the mortgages, and all rents were being paid on the mortgages. Peak acquired the mortgages after they were in default. He was therefore no bona fide holder for value without notice. If there had been no foreclosure the soldier would have had a right to an accounting. The Alabama Supreme Court denies any relief, thus in effect holding that the foreclosure had cut off the soldier's right to an accounting.

The Supreme Court of Alabama further states that the petitioner in this case is barred because of estoppel. Says the Supreme Court:

> "It is contended by the defendant that after the complainant and he both had been released from the Army service the defendant advised the complainant of his plan to improve the property and gave him an opportunity **to purchase it** or any part if he desired. This complainant declined, according to one aspect of the evidence" (underscoring supplied).

This is the Alabama Court's interpretation of respondent Peak's version of the matter, but even under this version we submit that the petitioner was entitled to relief. If the petitioner had the right to redeem a proportionate share of the property, the person who endeavored to foreclose the property had no right to require him to "purchase" the property or any part of it. The soldier had a right to an accounting of all moneys paid by Mr. Strickland, through the rental agreement, and had then the right to pay off his proportionate share or to pay off the indebtedness in full. The Supreme Court of Alabama seeks to take away from him his rights under the Soldiers' and Sailors' Relief Act because the soldier refuses to "purchase" his interest in the land from the person who foreclosed it.

The effort of the Supreme Court of Alabama to "bolster" its opinion by claiming that there is an estoppel is further weakened by the fact that the law provides that a foreclosure within the first three months after a man is out of military service is invalid. The improvements were begun and apparently a large portion of them completed, during this three months' period. Congress realized that when a man is discharged from service he needs a period in which to orient himself. It set this period as three months. We submit that it is inconsistent to say that during this three months the mortgagee could not foreclose the property, without court approval, but that during this same three months by inaction on the part of the

soldier (even if such inaction existed), he could be estopped from claiming his rights.

The "key" to the Supreme Court's opinion is in its assumption that the soldier is seeking to secure $20,000.00 of improvements free. The Supreme Court in its opinion says:

> "The bill in this case seeks to exercise the equity of redemption by paying the entire mortgage debt remaining unpaid, **but not for the improvements** . . ." (R. 275) (Underscoring supplied).

We submit that this is an unwarranted assumption on the part of the Supreme Court of Alabama. Nothing in the bill makes any such claim. The bill of complaint merely alleges that there has been a foreclosure contrary to the provisions of the Soldiers' and Sailors' Civil Relief Act. The Supreme Court of Alabama seems to say that they cannot allow such rights as petitioner is entitled to receive because they feel that he would be unjustly enriched. We submit that the Supreme Court of Alabama should have applied the law and granted such rights as the petitioner was entitled to receive. If the law of Alabama enriched him by allowing him to have the improvements it would not be an unjust enrichment. We do not think the Supreme Court of Alabama is logical in stating that it will deny the petitioner his rights under the Soldiers' and Sailors' Relief Act, because the court thinks the law of Alabama gives him too much.

As pointed out, the bill of complaint makes no claim for any improvements. What would be the rights of the parties in reference to such improvements would be determined in a court of equity.

CONCLUSION

In short, the man who was in military service at the time the purported foreclosure occurred petitioned the courts of Alabama to give him the rights to which he was

entitled under the Soldiers' and Sailors' Relief Act. The courts dismiss his bill. They say in their opinion that the only right he might have is in reference to a one-ninth share. But if he seeks to assert his right to that share he is barred because his equity has been cut off by a foreclosure which is on record, which foreclosure is in reference to the entire property. He has asked that the foreclosure be declared invalid, or that he be given such rights as he is entitled to receive. The court says that the foreclosure is valid as to eight-ninths, but lets the record stand that it is valid as to nine-ninths.

We submit that the courts of Alabama are in error in not declaring the entire foreclosure invalid in accordance with the expressed provisions of the Soldiers' and Sailors' Relief Act. We submit further that even under the interpretation of the Alabama Supreme Court, the foreclosure is not invalid as to eight-ninths, and that the Alabama Supreme Court erred in not setting aside the foreclosure in reference to one-ninth and in not granting to the petitioner the rights to which he was entitled in that one-ninth interest. The Alabama Supreme Court also erred in not requiring an accounting at least as to one-ninth interest in the rents which were being collected and applied on the mortgage at the time the petitioner went into military service.

We submit that under the circumstances the Supreme Court of the United States should review this case and give to the petitioner the rights to which he is entitled under the Soldiers' and Sailors' Relief Act.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the Supreme Court of the State of Alabama.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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